

FILED
COURT OF APPEALS
DIVISION II

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COA# 41256-0-II

STATE OF WASHINGTON

BY cm

DEPUTY In The
Court Of Appeals
For The State of Washington
Division II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LOPEZ

Appellant.

APPELLANT'S SUPPLEMENTAL PRO-SE BRIEF

Michael Lopez
#723940
Stafford Creek Corr. Ctr.,
191 Constantine Way,
Aberdeen, WA., 98520

APPELLANT-PRO-SE

CERTIFICATE OF SERVICE

I certify that I mailed
1 copies of SAG
to WS App. Project/Att. Gen.
& Mason Co. Pro. Office
10/6/11 cm
Date Signed

MICHAEL LOPEZ
723940
STAFFORD CREEK CORR. CTR.,
191 CONSTANTINE WAY,
ABERDEEN, WA., 98520

Petitioner, Pro-se

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,)	
)	COA# 41256-0-II
Respondent,)	
)	
v.)	SUPPLEMENTAL PRO-SE
)	BRIEF, RAP 10.3
MICHAEL LOPEZ,)	
)	
Appellant.)	
)	

I. INTRODUCTION

The Appellant, Mr. Michael Lopez, directly appeals his convictions, attacking specifically the VOIR DIRE, which he contends deprived him of the right to a fair trial and impartial jury as follows:

II. STATEMENT OF THE CASE

On June 2009, the Appellant, [hereafter "Lopez"] turned himself over to the custody of the Mason County

Superior Court at arraignment, after being charged with 2-counts of child molestation in the second degree. These false charges stemmed from his stepdaughter, L.M. CP 63-64. L.M. had apparently been in trouble with school teachers at the Hawkins Middle School where she attended, for continuously lying about completing her home and school-work. L.M.'s primary teacher, Ms. Hostack, was not interviewed by the defense, as requested by Lopez.

L.M. alleged that her step-father "touched" her. RP 153; 219; 225-28. However, Mrs. Lopez testified that she never noticed any problems with her husband or her daughter, L.M. RP 277; 281. After receiving ineffective assistance of counsel, [counsel's failure to interview potential defense witnesses], Lopez was convicted by jury trial, despite his innocence of the charges against him. Lopez appeals these convictions, alleging that he was deprived of a fair trial and impartial jury, by the right to have a juror excused when grounds for challenge are present.

III. SUMMARY

Lopez brings the issue of "implied bias" during voir dire, which may be considered for the first time on appeal under RAP 2.5(a). It goes to the impartiality of the factfinder, a right guaranteed by the Sixth Amendment, and a touchstone of the

constitutional guarantee of a fair trial. The voir dire itself is sufficient to establish a prima facie case of implied bias.

IV. ARGUMENT

THE APPELLANT'S CONVICTION WAS A DIRECT RESULT OF PROSECUTORIAL MISCONDUCT, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During Voir Dire, defense counsel failed to object and the trial court failed to intervene in regards to Juror number 4. Specifically, Juror 4 was found to be a relative of the prosecutor in this case, which constituted a basis for challenge for implied bias under RCW 4.44.180(2), which states in part:

"...or being a member of the family of ... or otherwise, for the adverse party."

RCW 4.44.180(2).

The relationship to examine in this case is the one between Juror 4 and the prosecutor. In this regard, the following had taken place during the voir-dire:

PROSECUTOR:

"Can you pass the microphone right behind you there? I [RP 96] almost said good morning, good afternoon."

JUROR 4:

"Yeah, pretty close."

PROSECUTOR: "Now, your name is Jerry De Roche?"
JUROR 4 "Yes."
PROSECUTOR: "And you are the brother of my wife's
father?"
JUROR 4 "I am."
PROSECUTOR: "Which makes you a monkey's uncle?"
JUROR 4 "Kind of, yeah."
PROSECUTOR: "Okay."
JUROR 4 "My niece's husband."

RP 96-97, [VOIR DIRE]. See EXHIBIT-A

As a "monkey's uncle" of the prosecutor, Juror 4 stands in being "a member of the family of" the prosecuting attorney with respect to the State. Therefore, a "substantial relationship exists between the interests of Juror 4 in the event of the action, or the principal question involved therein. RCW 4.44.180(4). The Appellant assigns error to this deprivation of the right to a fair and impartial trial, and argues that this constitutes prosecutor misconduct, warranting a new trial.

Both the United States and Washington State Constitutions provide a constitutional right to trial by jury, that is to be preserved and remain inviolate. U.S.Const. amend. VI; Const. art. I, §21.

In its essentials, a failure to provide a defendant with a fair hearing violates standards

of due process of law guaranteed by the Sixth Amendment. State v. Parnell, 77 Wn.2d 503, 507-08, 463 P.2d 134 (1969), (quoting, Irvin v. Dowd, 366 U.S. 717, 722 (1961)), overruled on oth. grounds by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001).

The right to trial by jury requires a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct. Smith v. Kent, 11 Wn.App. 439, 443, 523 P.2d 446 (1974).

Mr. Lopez argues that he is entitled to a new trial under the Sixth Amendment doctrine of implied bias. This doctrine applies only in certain exceptional circumstances. See State v. Cho, 108 Wn.App. 315, 325 n.5, 30 P.2d 496 (2001), (citing, Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, j., concurring)).

In Cho, the court of appeals held that a presumption of bias can arise from the juror's factual circumstances such as a juror is a close relative of one of the participants in the trial. *Id.* See also McDonough v. Power Equip. Inc., v. Greenwood, 464 U.S. 548, 556-57 (1984) (Brennan and Marshall, JJ., concurring).

In McDonough, a majority provided for a finding of implied bias without a showing of intentional concealment. 464 U.S. at 556-57.

In the instant case, Lopez has established a prima-
SUPPLEMENTAL PRO-SE BRIEF - 5

facie case of implied bias. Smith, 455 U.S. at 221. The presumption of implied bias would not be changed by the juror's earlier or later protestations of impartiality, however sincere. See e.g., State v. Scott, 854 F.2d 697, 699 (5th.Cir.1988).

To obtain reversal of a conviction on the basis of prosecutorial misconduct, Lopez has shown that the prosecutor's conduct was improper and that the conduct had a prejudicial affect, which means there must be a substantial likelihood the conduct affected the verdict. State v. Brett , 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).

The issue of implied bias is one that may be considered for the first time on appeal. RAP 2.5(a). It goes to the impartiality of the fact-finder, a right guaranteed by the Sixth Amendment, and a touchstone of the constitutional guarantee of a fair trial.

In the instant case, it is one in which the possibility of implied bias should have been considered. According to the voir dire, Juror 4 was a member of the prosecutor's family. By this fact alone, implied bias is conclusively presumed and therefore, Lopez is entitled to a new trial.

In this regard, Lopez has established prosecutorial misconduct under these circumstances, and this court should hold that there was an implied bias as a matter of law under Cho and Smith.

Further, RCW 2.36.110 and CrR 6.5, together, 'place a continuous obligation' on the trial court to investigate allegations of juror unfitness and to excuse juror who are found to be unfit, even if they are already deliberating. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). In determining whether a juror is biased, the trial judge serves as both an "observer and [a] decision maker." State v. Jordan, 103 Wn.App. 221, 229, 11 P.3d 866 (2000).

Therefore, Lopez was deprived of the right to a fair trial by an impartial fact finder.

V. CONCLUSION

Mr. Lopez respectfully request that this court reverse, and remand for new trial.

RESPECTFULLY SUBMITTED,

By:


/S/ MICHAEL LOPEZ
Appellant, Pro-se

EXHIBIT A

1 reason or another, or for no reason, be excused by the Court
2 yet.

3 JUROR NUMBER 11: Right.

4 MR. DORCY: But unless you are, you're a part of
5 this panel.

6 JUROR NUMBER 11: Right.

7 MR. DORCY: And we'll fill those empty seats by
8 going in numerical order right around the corner there down
9 the front row, okay? So you already understood that?

10 JUROR NUMBER 11: Uh huh.

11 MR. DORCY: Is there anybody who now that I'm
12 talking about it out loud is thinking for the first time,
13 gosh, where am I and trying to count where you're sitting
14 here? Okay, one, two, three, four, five, six; one, two,
15 three, four, five -- so that first row, all you folks in the
16 first row, there's six of you. There's six empty chairs.
17 Until things change, and they may, you folks are on this
18 jury. Is there anybody who -- of you first 13 -- and
19 there's 13 because that way we have an extra in case
20 something comes up while we're in trial. Anyone -- anyone
21 among you first 13 who have any particular negative reaction
22 to realizing at this point, if not before, that you're --
23 you're close enough to the front of this room to be on the
24 panel? Nobody, okay.

25 Can you pass the microphone right behind you there? I

1 almost said good morning, good afternoon.
2 JUROR NUMBER 4: Yeah, pretty close.
3 MR. DORCY: Now, your name is Jerry De Roche?
4 JUROR NUMBER 4: Yes.
5 MR. DORCY: And you are the brother of my wife's
6 father?
7 JUROR NUMBER 4: I am.
8 MR. DORCY: Which makes you a monkey's uncle?
9 JUROR NUMBER 4: Kind of, yeah.
10 MR. DORCY: Okay.
11 JUROR NUMBER 4: My niece's husband.
12 MR. DORCY: I just -- you indicated earlier you
13 know the defendant or one of the attorneys. I know you know
14 who I am.
15 JUROR NUMBER 4: Right.
16 MR. DORCY: You've indicated that wouldn't --
17 JUROR NUMBER 4: Right.
18
19 MR. DORCY: -- impair your ability to be fair and
20 impartial. I just want to get it out in the open that --
21 JUROR NUMBER 4: Right.
22 MR. DORCY: -- you know, I'm certainly -- so that
23 everybody's aware of the relationship. But will you still
24 be able to be fair and impartial as a juror in this case?
25 JUROR NUMBER 4: Oh, yeah.

1 MR. DORCY: Okay. And you've done it before, so
2 you know what --

3 JUROR NUMBER 4: Yes, I've been on several cases.
4 So --

5 MR. DORCY: -- the requirements are, okay. What
6 -- what then, if I may pick on you, are your expectations of
7 how this process is going to go from here?

8 JUROR NUMBER 4: Well, just questions and
9 answers.

10 MR. DORCY: Okay.

11 JUROR NUMBER 4: I mean --

12 MR. DORCY: What's the -- what -- what's the
13 point? What's the purpose? What are we trying to do here?

14 JUROR NUMBER 4: Well, find out if the person is
15 guilty or not guilty.

16 MR. DORCY: Okay. But before we even get to
17 that, what are we trying to do here?

18

19

20 JUROR NUMBER 4: Oh, just basically weed out the
21 people that really shouldn't be here, or -- or that aren't -
22 - are impartial or whatever. So --

23 MR. DORCY: Okay. Anybody else over here?
24 Number 13, let's have you have the microphone. We're trying
25 to ultimately end up with a jury who can be fair and

CERTIFICATE OF SERVICE
GR 3.1

I, MICHAEL LOPEZ, declares and say:

THAT, on 4th day of OCTOBER, 2011, I deposited
by First Class Mail, the following documents to
prison authorities:

APPELLANT'S SUPPLEMENTAL PRO-SE BRIEF & EXHIBIT-A
to the following addresses:

COURT OF APPEALS, DIV. II
950 Broadway Suite 300
Tacoma, Wa. 98402-4454

STATE OF WASHINGTON
BY _____
DEPUTY

11 OCT -6 PM 12:03

COURT OF APPEALS
DIVISION II

and to the prosecuting attorney's office:
Timothy J. Higgs, Mason Co. Pros Atty. Office
PO. Box 639
Shelton, Wa. 98584-0639

I declare under penalty of perjury under the laws
of the STATE OF WASHINGTON, that the foregoing
is true, correct, and complete.

DATED THIS 4th Day of OCTOBER, 2011.



/s/ MICHAEL LOPEZ
Stafford Creek corr. Ctr.,
191 Constantine Way,
Aberdeen, WA., 98520